

DEPARTMENT OF STATE REVENUE

04-20140089.LOF

Letter of Findings Number: 04-20140089
Sales Tax
For Tax Years 2010-12

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

The retail merchant did not meet their burden of proof to provide adequate records to verify its position that the kegs were exempt from use tax. The imposition of use tax was correct.

ISSUE**I. Use Tax—Exempt uses.**

Authority: IC § 6-8.1-5-1; IC § 6-2.5-3-2; IC § 6-2.5-5-3; IC § 6-2.5-3-8; [45 IAC 2.2-5-16](#); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Brambles Industries, Inc., v. Indiana Dept. of State Revenue, 892 N.E.2d 1287, 1290 (Ind. Tax Ct. 2008).

Taxpayer protests proposed assessments for use tax.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation. Taxpayer was assessed tax on multiple issues, but only the assessment of use tax on beer kegs and keg related purchases ("kegs") are under contention. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit which concluded that Taxpayer did not pay sales or use tax on the purchase of the kegs. The Department therefore issued proposed assessments for sales and use taxes, along with interest for those years. Taxpayer protests that the items in question were exempt under applicable state law and that the proposed assessment was incorrect. An administrative hearing was held, and this Letter of Findings results. Additional facts will be presented as necessary.

I. Use Tax—Exempt uses.**DISCUSSION**

Taxpayer protests the imposition of the use tax on kegs and keg related purchases for the tax years 2010, 2011, and 2012. The Department determined that the kegs are returnable containers and were reused by the Taxpayer to store, transport and serve beer, and are ultimately not exempt from a use tax. The Department based its determination on the fact that because Taxpayer charged a deposit for the kegs since it was expected that at least some, if not potentially all, of the containers would be returned for future use by the Taxpayer. Taxpayer protests that the kegs are not only used in the shipping/delivery of draft beer but are also used in the production of beer and should not be taxable. Taxpayer further argues that just as it is not possible to separate the production materials (i.e. hops, malt, yeast, water, etc.), which are all nontaxable at the brewing/manufacturing level and only taxable on the retail level, it is not possible to separate the kegs from the overall product of "draft beer." Taxpayer believes that the kegs should not be considered returnable.

The Department determined the kegs were returnable containers which contained a finished product which was being sold for consumption. As such, the kegs were not sold, rented or leased to Taxpayer's customers, but rather were used by Taxpayer in the course of selling the beer itself. Therefore, Taxpayer used the kegs in its business operations and thus the kegs were subject to use tax.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect.

As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Use tax is imposed by IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Next, the Department refers to IC § 6-2.5-5-3(b), which states in part:

[T]ransactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

Taxpayer protests that the kegs are exempt under IC § 6-2.5-5-3(b) because the kegs are not just delivery vessels but are actually an integral part of the draft beer experience. Taxpayer states that the kegs are nonreturnable because retail establishments and distributors are not obliged to return the kegs.

The Department notes that under [45 IAC 2.2-5-16\(d\)\(1\)](#), which provides that nonreturnable containers are exempt from sales and use taxes, the purchaser must purchase the shipping materials and add a product to the empty containers and then sell the contents and containers in order to purchase the containers exempt. The Taxpayer is adding materials to an empty container as provided in [45 IAC 2.2-5-16\(d\)\(1\)](#), but Taxpayer has not met the burden of proving that the containers are nonreturnable in order to satisfy the provision.

Also, under IC § 6-2.5-5-3(b), the tangible personal property must be directly used in the direct production of other tangible personal property. Taxpayer did not provide any documentation or analysis which establishes that the kegs are directly used in the direct production of the beer. Therefore, Taxpayer has not established that the kegs qualify as exempt under IC § 6-2.5-5-3(b).

The Indiana Tax Court addressed this issue and provided that returnable containers, relating to pallets, are defined as "containers customarily returned by the buyer of the contents for reuse as containers." *Brambles Industries, Inc., v. Indiana Dept. of State Revenue*, 892 N.E.2d 1287, 1290 (Ind. Tax Ct. 2008). The court, using Webster's Third International Dictionary, defined returnable containers as giving the container back to an earlier possessor and to bring, send or put back to or into an earlier position. *Id.* at 1291. In *Brambles*, the court stated: "Neither the statute, the regulation, nor the dictionary definition of the word 'return' require that the container go back to the person from whom it was immediately acquired in order to be considered 'returned,' as the manufacturers contend. It is enough that the pallets are pass[ed] back to an earlier possessor. . . ." Similarly, in the instant case, Taxpayer is routinely receiving most of the kegs back for continued use ultimately fitting the description of a returnable container. So long as a container is being returned, under [45 IAC 2.2-5-16\(d\)\(1\)](#) and *Brambles*, then the kegs qualify as returnable containers that are not exempt from the use tax.

Taxpayer has not met the burden imposed under IC § 6-8.1-5-1(c). Taxpayer has not proven the proposed assessments wrong.

FINDING

Taxpayer's protest is denied.

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